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In the Supreme Court of the United States

OCTOBER TERM, 1983

**W. THOMAS PLACHTER, JR. AND PETER J. SERUBO,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 3288 and 3289, which permit the statute of limitations to be extended after an indictment has been dismissed "for any error, defect, or irregularity with respect to the grand jury," are applicable where the initial indictment was dismissed because of prosecutorial misconduct before the grand jury.

(I)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

<i>Mende v. United States</i> , 282 F.2d 881, cert. denied, 364 U.S. 933	4
<i>United States v. Charnay</i> , 537 F.2d 341, cert. denied, 429 U.S. 1000	4
<i>United States v. DiStefano</i> , 347 F. Supp. 442	5, 6
<i>United States v. Durkee Famous Foods, Inc.</i> , 306 U.S. 68	4
<i>United States v. German</i> , 355 F. Supp. 679	6
<i>United States v. Hoffa</i> , 196 F. Supp. 25	5
<i>United States v. Macklin</i> , 535 F.2d 191	4
<i>United States v. Moriarty</i> , 327 F. Supp. 1045	5, 6
<i>United States v. Morrison</i> , 449 U.S. 361	5
<i>United States v. Porth</i> , 426 F.2d 519, cert. denied, 400 U.S. 824	4
<i>United States v. Strewl</i> , 99 F.2d 474, cert. denied, 306 U.S. 638	4

IV

	Page
Constitution, statutes and rule:	
U.S. Const.:	
Amend. V	5
Amend. VI	5
Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):	
26 U.S.C. 6531(1)	2
26 U.S.C. 7201	3
18 U.S.C. 371	3
18 U.S.C. 3288	2, 4, 5, 6
18 U.S.C. 3289	2, 3, 4, 5, 6
Fed. R. Crim. P. 48(a)	6

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OPINIONS BELOW

The judgment orders of the court of appeals (Pet. App. 1-2, 3-4) are not reported. The opinion of the district court (Pet. App. 5-8) is reported at 502 F. Supp. 288.

JURISDICTION

The judgments of the court of appeals were entered on April 28, 1983 (Pet. App. 2, 4). The petition for a writ of certiorari was filed on June 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were initially indicted on March 13, 1978, for violations of the internal revenue laws. They were convicted in 1978, but the convictions were vacated by the court of appeals, in part because of what the court characterized as "extreme" prosecutorial misconduct before the grand

jury. *United States v. Serubo*, 604 F.2d 807, 818 (3d Cir. 1979). In the course of presenting the case to the grand jury, the prosecutor questioned at least one witness about petitioners' links with organized crime, making graphic references to an alleged loansharking conspiracy for which an employee of petitioners' corporation had been tried and acquitted some years earlier. *Id.* at 814-815. Since this conduct occurred before a prior grand jury panel that had not returned an indictment, the court remanded for the district court to consider whether similar statements had been made before the second grand jury, the one that first indicted petitioners. (*id.* at 818) ("The presence of an independent grand jury would satisfy our concerns to preserve both the fact and the appearance of fairness in grand jury proceedings. No more would be required to sustain the indictment".)

2. On remand, the district court directed the government to provide petitioners with grand jury transcripts of all the proceedings underlying their indictment and with any other evidence on which the government had relied in posing questions concerning petitioners' links with organized crime (Pet. 6-7). Because disclosure of this information would compromise the grand jury's investigations of other matters, the government consented to petitioners' motions to dismiss the indictment, so long as it was dismissed without prejudice (C.A. App. 114a-116a).

On April 29, 1980, the district court dismissed the original indictment without prejudice (C.A. App. 117a). Within six months thereafter the government sought and obtained a new indictment against both petitioners, relying on the "savings" provisions of 18 U.S.C. 3288 and 3289 to avoid the bar of the six-year statute of limitations contained in 26 U.S.C. 6531(1). Pet. 7-8.¹ Section 3288 provides in relevant

¹The last overt act in support of the conspiracy was alleged to have occurred on June 12, 1974. Thus, the statute of limitations on the conspiracy charge would have run on June 12, 1980. The limitations

part that "[w]henever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury" after the applicable statute of limitations has expired, a new indictment may be returned within six months after the dismissal and shall not be barred by the statute of limitations. Section 3289 provides for a six-month extension from the expiration of the statute of limitations if the initial indictment is dismissed within six months before the limitations period would otherwise expire.

3. Following a jury trial, petitioner Plachter was convicted on six counts of willfully attempting to evade individual and corporate income taxes for the years 1971 through 1973, in violation of 26 U.S.C. 7201, and one count of conspiracy to defraud the government and to evade income tax, in violation of 18 U.S.C. 371. Petitioner Serubo was convicted on three counts of attempted income tax evasion, in violation of 26 U.S.C. 7201. The district court sentenced Plachter to six months in prison and five years' probation. Serubo was sentenced to six months in prison and five years' probation, and was ordered to pay all taxes, penalties, and interest in this case as a condition of probation. The court of appeals affirmed both convictions without written opinion (Pet. App. 1-2, 3-4).

ARGUMENT

The court of appeals correctly decided the issues presented. Its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

periods on charges of willful attempted evasion of personal income taxes would have expired on April 17, 1978 (1971 tax year), April 16, 1979 (1972 tax year), and April 15, 1980 (1973 tax year), respectively. The statute of limitations on the charges of willful attempted evasion of corporate taxes would have run on June 15, 1978 (1971 tax year), March 15, 1979 (1972 tax year), and June 12, 1980 (1973 tax year), respectively.

Petitioners contend (Pet. 9-18) that their reindictment was untimely and that the government may not rely on 18 U.S.C. 3288 and 3289 to extend the statute of limitations because those sections apply only where an indictment has been dismissed because of a technical error in the indictment itself or because of an error in selecting or convening the grand jury, and not where, as here, an indictment has been dismissed because of prosecutorial misconduct before the grand jury. This argument has no merit.

As this Court pointed out more than 40 years ago in *United States v. Durkee Famous Foods, Inc.*, 306 U.S. 68, 71 (1939), the predecessors to 18 U.S.C. 3288 and 3289 were enacted at the request of the Attorney General to safeguard the interests of the government in cases in which a timely indictment is found defective for *any cause* and dismissed after the statute of limitations has run or within six months before the statute would otherwise expire. The courts of appeals have consistently construed this statute in light of its manifest purpose of preventing a defendant, once timely indicted, from avoiding prosecution because of some error in the proceedings that could have been corrected if discovered in time. *United States v. Strewl*, 99 F.2d 474, 477 (2d Cir. 1938), cert. denied, 306 U.S. 638 (1939); *Mende v. United States*, 282 F.2d 881, 883 (9th Cir. 1960), cert. denied, 364 U.S. 933 (1961); *United States v. Porth*, 426 F.2d 519, 521-522 (10th Cir.), cert. denied, 400 U.S. 824 (1970); *United States v. Macklin*, 535 F.2d 191, 193 (2d Cir. 1976); *United States v. Charnay*, 537 F.2d 341, 353-354 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

The fact that the original, timely indictment in this case was dismissed because of prosecutorial misconduct before the grand jury does not preclude the application of the savings provisions of 18 U.S.C. 3288 and 3289. As the court of appeals held in vacating petitioners' convictions under the first indictment, the right that was implicated by the

actions of the prosecutor was petitioners' right to indictment by an unbiased grand jury as guaranteed by the Fifth Amendment. *United States v. Serubo, supra*, 604 F.2d at 816. This right could be fully vindicated by presenting the case to a new grand jury without the offending allegations of links between the petitioners and persons with known connections with organized crime. See *United States v. Hoffa*, 196 F. Supp. 25, 31-32 (S.D. Fla. 1961) (reindictment held permissible where the original indictment was returned by a grand jury selected in violation of the Civil Rights Act of 1957). As this Court held in *United States v. Morrison*, 449 U.S. 361, 364-365 (1981), a case involving the right to counsel under the Sixth Amendment, "the necessity for preserving society's interest in the administration of criminal justice" makes it inappropriate to dismiss an indictment with prejudice, even if there has been a deliberate violation of the defendant's rights by government agents, if some less drastic remedy will assure the defendant due process of law and a fair trial. Here, the petitioners have had the benefit of reindictment by an unbiased grand jury. They are entitled to no more.

Petitioners rely (Pet. 16-18) on *United States v. Moriarty*, 327 F. Supp. 1045 (E.D. Wis. 1971), and *United States v. DiStefano*, 347 F. Supp. 442 (S.D. N.Y. 1972), to support their contention that 18 U.S.C. 3288 and 3289 do not apply to dismissals caused by prosecutorial misconduct. This reliance is misplaced. In *Moriarty*, the court noted (327 F. Supp. at 1047; citation omitted) that the earlier indictments had been dismissed on the basis of the government's express representation that " 'the interest of justice demands no further prosecution.' "2 Similarly, in *DiStefano*, the

²Petitioners suggest (Pet. 10; citation omitted) that the government consented to dismissal of the indictment in this case "in the public interest." Unlike *Moriarty*, where the interests of justice "demand[ed] no further prosecution," the government here merely stated that

court relied (347 F. Supp. at 444) on the fact that the earlier indictments had been dismissed for failure to prosecute after the government had made a firm commitment that it would be prepared to go to trial on a date certain and then had failed to do so. In both of these cases, the governmental conduct giving rise to the dismissal of the earlier indictments was unrelated to the indictments themselves or to the grand jury proceedings, and occurred after the indictments had been returned. Here, on the other hand, the challenged conduct occurred before the original indictments were returned and, as the court of appeals held, *United States v. Serubo, supra*, 604 F.2d at 816, impaired the petitioners' right to indictment by an unbiased grand jury. Thus, the indictments in this case, unlike those in *Moriarty* and *Di-Stefano*, were dismissed because of an "error, defect, or irregularity with respect to the grand jury" and fall squarely within the savings provisions of 18 U.S.C. 3288 and 3289.³

"further proceedings to resolve the [petitioners'] claims of prosecutorial misconduct before the August 23, 1976, grand jury would not be in the public interest" (C.A. App. 115a-116a).

³Petitioners assert that "the Government's consent to the defendants' motion to dismiss the first indictment rendered it not substantively different from a dismissal initiated by the Government pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure" (Pet. 18 n.11) and that "[w]hen the Government seeks leave to dismiss an indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, neither Section 3288 nor 3289 applies" (*id.* at 17 n.9). The fact remains, however, that the district court granted a motion to dismiss the indictment because of prosecutorial misconduct before the grand jury. While the government consented to dismissal, it did not concur in petitioners' request that the dismissal be with prejudice (C.A. App. 116a; see *id.* at 119a-121a, 145a). That the government did not contest the entirety of petitioners' motion does not convert the court's action to a dismissal pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. See *United States v. German*, 355 F. Supp. 679, 682 n.6 (D.P.R. 1972).

